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Probate -- Discovery Available in Will Contests

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No writer could reasonably challenge the soundness of the court's position in the instant case. When an arm of the government seeks to take a man's property, every protection should be afforded the citizen so that he is fairly compensated. *Chicone* provides just that protection through a rule which assures that equity will be done. The law of Florida now fully protects all property owners who are confronted with eminent domain proceedings. To achieve a position closer to perfection in this area, only one step remains—the adoption of the corollary to the *Chicone* rule; that is, complete adoption of the Maryland rule so that the owner neither loses in the event of depreciation nor gains in the event of appreciation. This type of transition would not only protect the condemnee, but would also ensure that public funds would be fairly and prudently disbursed.

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PROBATE—DISCOVERY AVAILABLE IN WILL CONTESTS

The daughter of the testator renounced the ten dollars awarded her under the will in probate, and filed a petition for revocation of probate of the will, alleging the lack of mental capacity of the testator and undue influence. Prior to the trial the petitioner attempted to use certain discovery devices by serving the respondent-executors with requests for admissions, interrogatories, a notice for taking depositions, and a motion for production of documents. The objections of the respondent-executors were sustained and discovery was denied on the ground that the Florida Rules of Civil Procedure were inapplicable to a proceeding of this nature. By certiorari review of the interlocutory order, *held*, order quashed: a will contest is both a civil action and a special proceeding in the county judge's court, and when filed within a probate proceeding, the parties are entitled to the use of discovery devices provided for in the Florida Rules of Civil Procedure. *Estes v. Estes*, 158 So.2d 794 (Fla. 3d Dist. 1963).

A "will contest" is a legal proceeding brought for the purpose of determining whether or not a will is valid.[1] At the time that the right to devise realty by will was first conferred, it was not possible to contest a testamentary disposition[2] since there were no proceedings available to probate a will devising real property.[3] On the death of the testator the devisee under the will took possession of the land. Anyone who desired

1. *E.g.*, McCrary v. Michael, 109 S.W.2d 50 (Mo. App. 1937); Smith v. Negley, 304 S.W.2d 464 (Tex. Civ. App. 1957).

2. Campbell v. Porter, 162 U.S. 478 (1896); *In re* Dana, 138 Fla. 676, 190 So. 52 (1938); *In re* Duffy, 228 Iowa 426, 292 N.W. 165 (1940); *In re* Noble, 338 Pa. 490, 13 A.2d 422 (1940).

3. *In re* Duffy, *supra* note 2.

to challenge his right to possession could bring an action of partition, ejectment, writ of right,[4] or other proceedings.[5] The devisee could defend his possession by asserting that the will was a "muniment of title."[6] It was possible, however, that in an action of ejectment, the devisee's right to possession by virtue of the will could be sustained, and, in a subsequent action brought by a different person, the will which devised the property could be held invalid. This lack of definiteness caused to be recognized the necessity for remedial action.

Statutory regulation came in 1857 and filled this gap concerning proof, disproof and revocation of wills.[7] Other statutory regulation appeared in the United States, giving a prima facie status to any will once admitted to probate.[8] Today's will contest originated by statute,[9] which is now the exclusive method for setting aside a will.[10] If a party seeks to revoke the probate, the burden rests upon him to allege and prove facts sufficient to warrant revocation.[11] This action is a new and independent substantive right,[12] but because it is in derogation of the common law, it must be strictly construed.[13]

The majority of states wherein the problem providing for the right to contest a will has been presented hold that a will contest is a civil action.[14] A "civil action" is generally defined as an ordinary proceeding in a court of justice by one party against another for the enforcement of

4. Green v. Liter, 12 U.S. (8 Cranch) 229 (1814).

5. *In re* Duffy, *supra* note 2.

6. *In re* Baker, 170 Cal. 578, 585, 150 Pac. 989, 992 (1915).

7. Probate Act of 1857, 20 & 21 Vict., c. 77.

8. Tompkins v. Tompkins, 24 Fed. Cas. 40 (No. 14091) (C.C.D. R.I. 1841). See also Strickland v. Peters, 120 F.2d 53 (5th Cir. 1941).

9. *E.g.*, *In re* Walter, 89 Cal. App. 2d 797, 202 P.2d 89 (1949); State *ex rel.* Ashby v. Haddock, 140 So.2d 631 (Fla. 1st Dist. 1962); Ptaszek v. Konczal, 7 Ill. 2d 145, 130 N.E.2d 257 (1955); Dodge v. Detroit Trust Co., 300 Mich. 575, 2 N.W.2d 509 (1942); Stitt v. Cox, 52 N.M. 24, 190 P.2d 434 (1948); Peters v. Moore, 154 Ohio St. 177, 93 N.E.2d 683 (1950); *In re* Kane, 20 Wash. 2d 76, 145 P.2d 893 (1944).

10. *E.g.*, Yung v. Peloquin, 6 Ill. App. 2d 258, 127 N.E.2d 252 (1955); State *ex rel.* Wilson v. Howard Circuit Court, 237 Ind. 263, 145 N.E.2d 4 (1957); *In re* Meredith, 275 Mich. 278, 266 N.W. 351 (1936); Campbell v. St. Louis Union Trust Co., 346 Mo. 200, 139 S.W.2d 935 (1940); Stitt v. Cox, 52 N.M. 24, 190 P.2d 434 (1948); *In re* Puett, 229 N.C. 8, 47 S.E.2d 488 (1948); Gravier v. Gluth, 163 Ohio St. 232, 126 N.E.2d 332 (1955).

11. Barry v. Walker, 103 Fla. 533, 137 So. 711 (1931).

12. *E.g.*, *In re* Walter, 89 Cal. App. 2d 797, 202 P.2d 89 (1949); *In re* Martinez, 47 N.M. 6, 132 P.2d 422 (1942); Leathers v. Binkley, 196 Tenn. 80, 264 S.W.2d 561 (1954).

13. *E.g.*, State *ex rel.* Ashby v. Haddock, 140 So.2d 631 (Fla. 1st Dist. 1962); Braeuel v. Reuther, 270 Mo. 603, 193 S.W. 283 (1917); Stitt v. Cox, 52 N.M. 24, 190 P.2d 434 (1948); *In re* Elliott, 22 Wash. 2d 334, 156 P.2d 427 (1945).

14. O'Day v. Superior Court, 18 Cal. 2d 540, 116 P.2d 621 (1941); Simpson v. Simpson, 273 Ill. 90, 112 N.E. 276 (1916); Fort v. White, 54 Ind. App. 210, 101 N.E. 27 (1913); McFadden v. McFadden, 179 Kan. 455, 296 P.2d 1098 (1956); Callaway v. Blankenbaker, 346 Mo. 383, 141 S.W.2d 810 (1940); *In re* Blake, 33 N.J. Super. 229, 109 A.2d 705 (P. Ct. 1954); *In re* Morrow, 41 N.M. 723, 73 P.2d 1360 (1937); People *ex rel.* Lewis v. Fowler, 229 N.Y. 84, 127 N.E. 793 (1920); Hymel v. Bing, 67 Ohio App. 432, 31 N.E.2d 112 (1940); *In re* Swan, 4 Utah 2d 277, 293 P.2d 682 (1956).

a private right or the redress or prevention of a private wrong.[15] Inherent in a civil action is the concept of an adversary proceeding. In a will contest, this spirit of adversity is present since each person contesting the will has a claim antagonistic to all others and the claims of others are antagonistic to his interests.[16] Some courts have held that once adverse claims are asserted the action emerges as an independent,[17] self-sustaining civil action, and by statute, the parties are entitled to all the rights of an ordinary jury trial.[18] Therefore, once a will contest is classified as a civil action either by virtue of its nature,[19] or specifically by statute,[20] it comes within the purview of rules of civil procedure,[21] including all those rules in the area of discovery.

The United States Supreme Court has taken the lead in expanding the rules of civil procedure for federal courts,[22] and state supreme courts generally have followed suit. Today the policy of the federal and state courts is towards great liberality in the interpretation and application of the rules, especially with regard to those concerning discovery.[23] In any judicial proceeding the purpose of the pre-trial discovery devices is to encourage the fullest presentation of the facts, minimize the introduction of falsified evidence, and to eliminate the formal fictions of trial by combat.[24] One court explained that our modern devices are "intended to facilitate discovery, not to stimulate the ingenuity of lawyers and judges to make the pursuit of discovery an obstacle race."[25]

The minority of those states specifically dealing with the right to contest the probate of a will, however, refuse to classify a will contest as a civil action,[26] and therefore, hold that the rules of civil procedure are inapplicable. Those jurisdictions distinguish the proceeding as "a

15. See Lee v. Lang, 140 Fla. 782, 192 So. 490 (1940).

16. *In re* Friedman, 173 Cal. 411, 413, 160 Pac. 237, 238 (1916): "His hand will be against every man, and every man's hand against him."

17. *In re* Martinez, 47 N.M. 6, 132 P.2d 422 (1942).

18. People *ex rel.* Lewis v. Fowler, 229 N.Y. 84, 127 N.E. 793 (1920).

19. See note 16 *supra.*

20. *E.g.*, Evans v. Evans, 109 Kan. 608, 201 Pac. 60 (1921); Clark v. McFarland, 99 Ohio St. 100, 124 N.E. 164 (1918).

21. The inherent purpose of both the federal and state rules of civil procedure is to formulate rules of practice and procedure for all suits of a civil nature. *E.g.*, Introduction, FLA. R. CIV. P.

22. The Federal Rules of Civil Procedure were expanded through amendments adopted by the United States Supreme Court. 28 U.S.C. § 2072 (1958), as amended, 28 U.S.C. § 2072 (Supp. IV, 1963).

23. *E.g.*, United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954); Paley v. Superior Court, 137 Cal. App. 2d 450, 290 P.2d 617 (1955); Reeves v. Penaluna, 66 N.W.2d 864 (Iowa 1954); Drake v. Bowles, 97 N.H. 471, 92 A.2d 161 (1952).

24. State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

25. Barnes v. Lednum, 197 Md. 398, 406, 79 A.2d 520, 524 (1951).

26. Nelson v. Cowling, 89 Ark. 334, 116 S.W. 890 (1909); Henry v. Spurlin, 277 Ky. 114, 125 S.W.2d 992 (1939); Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950); *In re* Noble, 338 Pa. 490, 13 A.2d 422 (1940); *In re* Golder, 37 S.D. 397, 158 N.W. 734 (1916); Jones v. Witherspoon, 182 Tenn. 498, 187 S.W.2d 788 (1945).

special action,"[27] a "proceeding in rem,"[28] "sui generis,"[29] or "a judicial inquiry."[30] Speaking for the minority position, South Dakota[31] reasons that a petition to probate a will originates as a "special proceeding," and that the subsequent filing to contest the probate does not change the nature of the proceeding. The will contest is entitled, "In the matter of the estate of" the deceased. All the vitality and origin of the revocation proceeding is conceived in the original petition to probate the will and the statutory provisions governing the proceedings. Therefore, a will contest is not converted into a civil action, but retains the nature of a special proceeding.[32]

In the instant case, the Florida Third District Court of Appeal followed the majority position and held that a will contest is a civil action. The court delineated the adversary nature of the action as a decisive factor, as well as the ability of the action to stand independently. In Florida, a petition to revoke a will "would be filed by separate suit."[33] For example, provisions are made for revocation of probate after settlement of the estate, if a second will is discovered within three years after the probate proceedings are closed, which expressly or impliedly revokes the first.[34] However, when the petition for revocation is filed during the pendency of a probate proceeding, the statute directs that it be filed within the existing probate action.[35] A proceeding for revocation of probate retains its basic characteristic as a separate action and is no less a civil action, regulated by the rules of procedure, merely because filed in probate when the conditions so require.

To determine the scope of the Florida Rules of Civil Procedure the court sought support on two grounds. In the first place, the introduction to the rules states that the rules are intended "to govern *all suits of a civil nature* and all special statutory proceedings of . . . the County Judge's Court."[36] Furthermore, the Florida Legislature has expressly indicated that "in all civil matters . . . the rules of practice and pleading in [the County Judge's Court] . . . shall be the Florida rules of civil

27. Nelson v. Cowling, 89 Ark. 334, 116 S.W. 890 (1909); *In re* Golder, 37 S.D. 397, 158 N.W. 734 (1916).

28. Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950).

29. Jones v. Witherspoon, 182 Tenn. 498, 187 S.W.2d 788 (1945).

30. Henry v. Spurlin, 277 Ky. 114, 125 S.W.2d 992 (1939).

31. *In re* Golder, 37 S.D. 397, 158 N.W. 734 (1916).

32. *Ibid.* The South Dakota decision cited to *In re* Joseph, 118 Cal. 660, 50 Pac. 768 (1897), to explain its rationale. Since the time of the South Dakota case, however, it should be noted that California has changed its position and now holds a will contest to be a civil action. See note 14 *supra*.

33. Estes v. Estes, 158 So.2d 794, 796 (Fla. 3d Dist. 1963).

34. FLA. STAT. §§ 732.32-.33 (1963).

35. FLA. STAT. § 732.30 (1963).

36. Introduction, FLA. R. CIV. P. (Emphasis added.) The Florida Rules of Civil Procedure were drafted and are regulated by the state supreme court, acting pursuant to the power vested under the Florida Constitution of 1885. FLA. CONST. art. V, § 3.

procedure as may now and hereafter be adopted by the supreme court."[37] Secondly, the *Estes* court fortified its holding by classifying a will contest as "a special statutory proceeding."[38] Inasmuch as Rule A of the Florida Rules of Civil Procedure expressly states that these rules should apply to "all special statutory proceedings in . . . County Judge's Courts," it would appear thereafter, that the decision could be supported by this language alone.

Whether a will contest be classified a civil action or a special statutory proceeding, the Rules of Civil Procedure promulgated by the supreme court, including the rules of discovery in this area of probate, are fully applicable. The court indicated that it was, therefore, immaterial whether the action is classified as in rem or in personam.[39] Equally meaningless in this inquiry is the technical division of the Florida Rules into parts B, C, and D, since discovery is equally available in all parts.[40]

A caveat may be in order concerning the breadth of the instant decision. The *Estes* case in no way enlarges the statutory qualifications which permit one to contest the probate of a will. The obvious reason for limitations is to prevent a decedent's estate from being subjected to time-consuming litigation by non-interested parties. Requisite interest in the estate is an essential condition to the right to litigate. To qualify under section 732.30 of the Florida Statutes one still must qualify, with certain exceptions,[41] either as an heir, a distributee of the estate of the decedent, or as a legatee or devisee under a former will.[42]

Concerning statutory construction as to "interested parties," a divergence of views exists between the First and Third District Courts of Appeal in Florida. The First District has taken a position "to broaden rather than restrict the definition of those entitled to contest the probate of an alleged will."[43] This liberality concerning parties who have standing to contest a will "is an inherited tradition of great antiquity."[44] A more

37. FLA. STAT. § 36.09 (1963). The Florida Statutes also state that all rules of civil procedure shall supersede conflicting rules and statutes. FLA. STAT. § 25.371 (1963).

38. 158 So.2d 794, 797 (1963).

39. *Ibid.* Previously a will contest in Florida was a proceeding in rem. Gardiner v. Goertner, 110 Fla. 377, 149 So. 186 (1933).

40. Estes v. Estes, 158 So.2d 794, 796 (Fla. 3d Dist. 1963).

41. The only exceptions where one may not qualify under the statutory requirements are where a statutory "real party in interest," under section 732.30 of the Florida Statutes: (1) has notice of probate and does not contest within the time allowed, FLA. STAT. § 732.30(1) (1963); (2) has waived the probate proceeding, FLA. STAT. § 732.28(5) (1963); or, (3) is barred by the special caveat proceedings, FLA. STAT. § 732.30(1) (1963).

42. FLA. STAT. § 732.32 (1963).

43. State *ex rel.* Ashby v. Haddock, 140 So.2d 631, 636 (Fla. 1st Dist. 1962). To support its liberal interpretation of the statute, the court held that "(the statute) is to be strictly construed to the end that persons entitled may not be summarily deprived of an opportunity to establish their interest in an estate and, by the same token, in order that the intentions of the testator be not frustrated." *Ibid.*

44. *Id.* at 636.

contemporary reason for the liberality is the present trend towards the creation of destructive trusts.[45]

On the other hand, in the Third District Court of Appeal case of *Yarmark v. Botsikas*,[46] the court insisted on a narrow, literal reading of the statute and discovery was denied to the prospective claimants. It is interesting to note that *Yarmark* was decided on the same day as the *Estes* case, by a bench which included two of the same judges. The facts showed that the claimant petitioned the estate for production of documents concerning its assets. The district court of appeal quashed the order of the county judge's court which had allowed production, because the claimants were not within those statutory classifications granted standing in an order for production. The cases are distinguishable in several respects. In the first place, the claimants in *Yarmark* were not contesting a will as statutory "real parties in interest," under section 732.30 of the Florida Statutes. Rather, they were petitioning under section 733.51 to determine the assets of the estate, both to facilitate the preparation and filing of their claim against the estate and to assure the safekeeping of the assets in the hands of the administratrix. Secondly, the petitioners in *Yarmark* had no interest under the will, either as legatees, creditors, distributees, devisees, or heirs at law, as contrasted with the daughter's status as heiress in *Estes*. Thus, the *Yarmark* decision is not inconsistent with *Estes* in that discovery in the two cases was sought for different reasons, under different statutes, and by different persons.

It would seem that the *Estes* court also might have based its decision on the authority of section 732.13 of the Florida Statutes, which provides that depositions de bene esse may be taken in probate in the manner provided under Rule 1.32 of the Florida Rules of Civil Procedure. However, Rule 1.32 was abolished in 1961 and the present rule no longer provides for de bene esse depositions. It is submitted, therefore, that the Florida Rules of Civil Procedure have retained no distinction between the general "discovery" depositions and "de bene esse" depositions, and depositions should now be able to be taken in probate proceedings in the same manner as provided for in the rules.

One unanswered question remains as to the full extent of the applicability of the Florida Rules of Civil Procedure to will contests. Even though the federal courts have abolished almost all distinctions between common law and equity for pleading purposes, Florida has retained the distinction. Perhaps the will contest will first of necessity be characterized as equitable, according to the basic nature of the action of revocation sought, in order to ascertain which parts of the rules apply. Or, it may

45. Ibid.
46. 158 So.2d 770 (Fla. 3d Dist. 1963).

be that this statutory "civil action" will also be entitled to the rules of civil procedure on the law side, such as trial by jury. Generally, those states making a will contest a common law action confer jurisdiction on the common law courts by statute.[47] Thus, in the absence of statute in Florida, the action will probably be initially characterized as equitable.

Though the instant case is one of first impression in Florida, it has solid support by foreign case law and by Florida statutory construction. It should serve to establish new guideposts for proceedings in probate courts within the Third District Court of Appeal's jurisdiction —an area which formerly was noted for its lack of uniformity from county to county.[48] The utopian situation, however, can only be reached by state-wide uniformity in this area.

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INCOME TAX—EMPLOYEE'S REIMBURSEMENT FOR LOSS ON SALE OF RESIDENCE

The petitioner accepted new employment which required that he move to a distant city. His family remained to attend to the sale of their residence. It became apparent, however, that the house could not be sold at its appraised value. When the new employer realized that this situation was interfering with the employee's performance, he offered to reimburse him for the difference between the appraised value of the home and the amount realized from the sale. Pursuant to the employer's offer, the employee received a reimbursement of five thousand dollars, which he failed to include in his reported income. The Tax Court held that the amount was compensation for services and consequently taxable income to the taxpayer.[1] On appeal, *held, affirmed*: a payment which constitutes an economic benefit to the taxpayer which arises out of his employment is to be treated as compensation for services. *Bradley v. Commissioner*, 324 F.2d 610 (4th Cir. 1963).

The Internal Revenue Code defines "gross income" as "all income from whatever source derived."[2] The code uses three categories to afford

47. Statutes in some states providing for a will contest make it a common law action, conferring jurisdiction on the common law courts. Miles v. Long, 342 Ill. 589, 174 N.E. 836 (1931); Dean v. Swayne, 67 Kan. 241, 72 Pac. 780 (1903); Hans v. Holler, 165 Mo. 47, 65 S.W. 308 (1901); People *ex rel.* Lewis v. Fowler, 229 N.Y. 84, 127 N.E. 793 (1920); 3 PAGE, WILLS § 26.50 (3d ed. 1961).

48. BROOKER, PRACTICE AND PROCEDURE IN THE COUNTY JUDGE'S COURT OF HILLSBOROUGH COUNTY, FLORIDA (2d ed. 1954).

1. Harris W. Bradley, 39 T.C. 652 (1963).

2. "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ." INT. REV. CODE OF 1954, § 61(a).